# Noor Mohamad bin Zakaria & Ors v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS K-05–114–05 OF 2012, K-05–115–05 OF 2012 & K-05–116–05 OF 2012

AZAHAR MOHAMED, ROHANA YUSUF AND TENGKU MAIMUN JJCA

20 NOVEMBER 2013

*Criminal Procedure — Appeal — Appeal against conviction and sentence — Three accused persons convicted for offence of drugs trafficking — Sentenced to death — Whether defence created reasonable doubt — Whether convictions of all accused persons safe — Dangerous Drugs Act 1952*

*Evidence — Informer — Failure to call informer as witness — Involvement of informer — Whether informer played active role in transaction — Whether assumed role of agent provocateur — Dangerous Drugs Act 1952 s 40 — Whether informer could claim protection from disclosure of identity — Non-calling of informer — Whether should have been called by prosecution — Whether non-calling detrimental to prosecution case — Adverse inference — Whether ought to be invoked for non-calling of informer — Evidence Act 1950 s 114(g)*

The appellants were Myanmar nationals who were charged for trafficking in dangerous drugs, an offence under the Dangerous Drugs Act 1952 ('DDA'). Two police officers acting as agent provocateurs, SP4 and SP5 were approached by the second and third appellants and they discussed about the purchase of heroin at a price of RM11,500 per pound to be delivered at a promised venue. On the day of the transaction, the appellants met SP4 and SP5. After seeing the money brought by SP4 and SP5, the first appellant left the location and came back 10 minutes later carrying a blue plastic bag. After inspecting the blue plastic bag and convinced that it contained dangerous drugs, SP4 signalled the ambush party and the three appellants were then arrested by the police. In their defence, the appellants submitted that this was not a case involving agent provocateurs but an ordinary case where they were arrested with two other Myanmar nationals. It was further submitted that the police had found drugs in a motorcycle parked nearby and they were not involved in the negotiation to sell or purchase the drugs. The judicial commissioner ('JC') found that the defence failed to raise a reasonable doubt and convicted the appellants and sentenced them to death. Hence, the present appeal. The issues for the court's determination were the non-calling of the alleged two Myanmar nationals;

whether there was discrepancy in the weight of drugs; and the role of the informer.

**Held,** dismissing the appeal by the first appellant and allowing the appeal by the second and third appellants:

(1) The issue of non-calling of the two Myanmar nationals was devoid of merits. On the evidence as a whole, this case involved agent provocateurs with the active involvement of an informer (see paras 11–12).

(2) The drugs seized were the same drugs that were sent to the chemist for analysis and which were later tendered in court as evidence. The identity of the drugs was never challenged during the trial (see para 14).

(3) The so-called informer was not a passive informer and he did not merely act as an interpreter but had played an active role in the whole transaction. The informer was present after they had met the second and the third appellants. The informer was involved in the discussion or negotiation on the price and quantity of heroin and the informer was present from the beginning until the appellants were arrested. In the circumstances, the informer could not be said to be an informer within the meaning of s 40 of the DDA and could not claim any protection from disclosure of his identity. The informer was essential to the unfolding of the prosecution case (see paras 16–17).

(4) The informer who had assumed the role of an agent provocateur should have been called by the prosecution. The failure to call or offer the informer in the circumstances of the case would have triggered the adverse inference under s 114(g) of the Evidence Act 1950, against the prosecution. This was a serious misdirection by way of a non-direction by the JC which rendered the conviction of the second and third appellants wholly unsafe (see para 17).

(5) The first appellant had failed to rebut the presumption of trafficking on the balance of probabilities. The evidence relating the first appellant was overwhelming. The evidence that it was the first appellant who had carried the plastic bag remained unchallenged. It was also the first appellant who threw away the bag when confronted by the police. The first appellant's conduct led to an irresistible inference that he knew the bag he was carrying contained the impugned drugs (see para 19).

**[Bahasa Malaysia summary**

Perayu-perayu merupakan warganegara Myanmar yang telah dituduh mengedar dadah berbahaya, satu kesalahan di bawah Akta Dadah Berbahaya 1952 ('ADB'). Dua orang pegawai polis yang bertindak sebagai ejen perangkap, SP4 dan SP5 telah didekati oleh perayu kedua dan ketiga dan mereka berbincang mengenai pembelian heroin pada harga RM11,500 sepaun

yang akan dihantar di tempat yang dijanjikan. Pada hari transaksi, perayu-perayu bertemu dengan SP4 dan SP5. Selepas melihat wang yang dibawa oleh SP4 dan SP5, perayu pertama meninggalkan lokasi dan kembali semula 10 minit kemudian dengan membawa satu beg plastik berwarna biru. Selepas memeriksa beg plastik biru tersebut dan yakin bahawa ia mengandungi dadah berbahaya, SP4 memberi isyarat kepada pasukan serang hendap dan ketiga-tiga perayu kemudiannya ditangkap oleh pihak polis. Dalam pembelaan mereka, perayu-perayu menyatakan bahawa ini bukanlah kes yang melibatkan ejen perangkap tetapi satu kes biasa yang mana mereka ditangkap bersama-sama dengan dua orang warganegara Myanmar yang lain. Selanjutnya dinyatakan bahawa pihak polis telah menjumpai dadah di motorsikal yang diletakkan berhampiran dan bahawa mereka tidak terlibat dalam rundingan untuk menjual atau membeli dadah. Pesuruhjaya kehakiman ('PK') mendapati bahawa pihak pembelaan gagal membangkitkan keraguan munasabah dan menyabitkan perayu-perayu dan menjatuhkan hukuman mati ke atas mereka. Oleh itu, rayuan ini. Isu-isu yang perlu diputuskan oleh mahkamah adalah kegagalan memanggil dua orang warganegara Myanmar yang didakwa; sama ada terdapat percanggahan dalam berat dadah tersebut; dan peranan pemberi maklumat.

**Diputuskan**, menolak rayuan perayu pertama dan membenarkan rayuan perayu kedua dan ketiga:

(1) Isu kegagalan memanggil dua orang warganegara Myanmar tersebut tidak bermerit. Berdasarkan keseluruhan keterangan, kes ini melibatkan ejen perangkap dengan penglibatan aktif pemberi maklumat (lihat perenggan 11–12).

(2) Dadah yang dirampas merupakan dadah yang sama yang dihantar kepada ahli kimia bagi analisis dan kemudiannya dikemukakan di mahkamah sebagai keterangan. Identiti dadah tersebut tidak pernah dicabar sewaktu perbicaraan (lihat perenggan 14).

(3) Pemberi maklumat tersebut bukanlah pemberi maklumat yang pasif dan dia tidak sekadar bertindak sebagai jurubahasa sahaja tetapi juga memainkan peranan aktif dalam keseluruhan transaksi. Pemberi maklumat hadir ketika mereka berjumpa dengan perayu kedua dan ketiga. Pemberi maklumat terlibat dalam perbincangan dan rundingan mengenai harga dan kuantiti heroin dan pemberi maklumat juga ada bersama-sama dari awal hingga perayu-perayu ditangkap. Dalam hal keadaan ini, pemberi maklumat tidak boleh dikatakan seorang pemberi maklumat dalam maksud s 40 ADB dan tidak boleh menuntut sebarang perlindungan daripada pendedahan identitinya. Pemberi maklumat adalah penting dalam pembentangan kes pendakwaan (lihat perenggan 16–17).

(4) Pemberi maklumat yang telah memainkan peranan sebagai ejen

perangkap sepatutnya dipanggil oelh pihak pendakwaan. Kegagalan untuk memanggil atau menawarkan pemberi makumat dalam hal keadaan kes akan membangkitkan tanggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap pihak pendakwaan. Ini adalah salah arah yang serius akibat tiada arah diri oleh PK yang menjadikan sabitan perayu kedua dan ketiga secara keseluruhannya tidak selamat (lihat perenggan 17).

(5) Perayu pertama telah gagal menyangkal anggapan pengedaran atas imbangan kebarangkalian. Keterangan berkaitan perayu pertama amat banyak. Keterangan bahawa perayu pertamalah yang telah membawa beg plastik tersebut kekal tidak dicabar. Perayu pertama jugalah yang telah mencampakkan beg tersebut apabila berhadapan dengan pihak polis. Tindakan perayu pertama membawa kepada satu inferens yang kuat bahawa dia mengetahui bahawa beg yang dibawanya mengandungi dadah yang menjadi persoalan (lihat perenggan 19).]

**Notes**

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

For cases on failure to call informer as witness, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2229–2230.

**Cases referred to**

*Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1, SC (refd)
*Hasbala Mohd Sarong v PP* [2013] 6 MLJ 636, FC (refd)
*Kamalahassan a/l Latchimanan v Pendakwa Raya* [2008] 3 MLJ 810; [2008] 4 CLJ 794, CA (refd)
*Loh Kah Loon v PP* [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (refd)
*Parlan bin Dadeh v PP* [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
*PP v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
*Ti Chuee Hiang v PP* [1995] 2 MLJ 433; [1995] 3 CLJ 1, SC (refd)
*Tunde Apatira & Ors v PP* [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)

**Legislation referred to**

Dangerous Drugs Act 1952 ss 37(da), 40
Evidence Act 1950 s 114(g)
Penal Code s 34

**Appeal from:** Criminal Trial No 45A–19 of 2011 (High Court, Alor Setar)

*KA Ramu (KA Ramu Vasanthi & Associates) for the first appellant.*
*RSN Rayer (R Nethaji Rayer & Co) for the second appellant.*
*Jason Khor (V Parthipan & Khor) for the third appellant.*
*Diar Isda Yazmin Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Tengku Maimun JCA (delivering judgment of the court):**

**[1]** The first, second and the third appellants (Myanmar nationals) were the first, second and third accused persons respectively in the High Court where they were tried and convicted for trafficking in dangerous drugs under the Dangerous Drugs Act 1952 ('the Act') read together with s 34 of the Penal Code. Each of the appellant was sentenced to death.

**[2]** The gist of the prosecution's case is that two police officers ('SP4 and SP5') who had played the role of agent provocateurs, accompanied by an informer, had met up with the appellants for the purchase of the drugs. On 29 August 2010, SP4 and SP5 were approached by the second and third appellants. They discussed the purchase of heroin at a price of RM11,500 per pound. On 6 September 2010, the first appellant came with an Indian male where they met the second and the third appellants and the agent provocateurs at Caltex Petrol Station, Taman Sejati, Kuala Muda, Kedah. According to SP4, he brought the flash money. There were some discrepancies in the evidence of the prosecution's witnesses in respect of the flash money. SP4 said that it was his own money in the sum of RM12,000 which he had withdrawn from his bank savings account while SP5 testified that SP4 had given him the flash money in the sum of RM23,000. The investigating officer was not able to confirm the amount of flash money involved. All he said was that the amount was about RM20,000.

**[3]** Back at the Caltex Petrol Station on 6 September 2010, after the appellants had seen the money, the first appellant left the location with the male Indian. The first appellant came back after ten minutes later, carrying with him a blue plastic bag. The first appellant showed the blue plastic bag to SP4. Inside the blue plastic bag, SP4 found that there was one black plastic bag and one *kotak air soya Yeo's*. Inside the black plastic bag, there were two plastic bags containing substance which was later confirmed by the chemist ('SP1') to be heroin and monoacethymorphines. SP4 gave the signal and when the police team moved in, the first appellant threw the blue plastic bag on the floor. All the three appellants were then arrested by the police.

**[4]** Having heard the prosecution's witnesses, the learned judicial commissioner found as follows:

> [25]… Evidence of SP4 and SP5 proved that on the 29 August 2010, SP4, OKT2, OKT3 had a discussion to sell the drugs and on the 6 September 2010 SP4 and SP5 met with the three accused when they came to see the money as promised by SP4. To complete the transaction, OKT1 brought together the drugs and they were arrested. The evidence adduced proved that the three accused were involved in the

trafficking of the drugs. Therefore there was a plan and meeting of minds of the accused to commit an offence and the delivery of the drugs was done in concert pursuant to their pre-arranged plan. The prosecution has therefore proved that OKT1, OKT2 and OKT3 had mens rea possession and knowledge of the drugs and their acts and conduct and circumstances of this case showed that they had acted in furtherance of their common intention.

[26] In the context of the present case, evidence of SP6 that OKT1 threw the drugs was not challenged by the defence. To my mind the conduct of the accused throwing the plastic bag on the floor leads to the irresistible inference of knowledge and hence the prosecution has established a prima facie case of actual possession.

**[5]** The learned judicial commissioner further states:

[29]… the three accused had actual, positive possession or mens rea possession of the drugs within the meaning in *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54; [1948] 1 LNS 154. As the net weight of the drugs is 56.22 grams (48.2 gram Heroin and 8.02 Monoacetylmorphine in excess of the stipulated statutory limit, the prosecution has also succeeded in invoking the presumption of trafficking under s 37(da) of the Act. I am satisfied that the prosecution had succeeded in establishing a prima facie case of actual drugs trafficking under s 2 of the Act. Hence the three accused were called upon to enter their defence as charged.

**[6]** All the three appellants gave statements from the dock. In essence, the defence of each of them is that this is not a case involving agent provocateurs but an ordinary arrest case where they were arrested at the Caltex Petrol Station with two other Myanmar nationals; that the reason for their arrest was because the police had found drugs in a motorcycle parked at the petrol station and that they were not involved in the negotiation to sell or purchase the drugs.

**[7]** The learned judicial commissioner found that the defence failed to raise a reasonable doubt on the prosecution's case. The appellants were thus convicted and sentenced to death, hence the appeal before us.

**[8]** Before us, learned counsel for the first appellant raised two main issues as follows:

(a) the non-calling of the two Myanmar nationals; and

(b) the discrepancy of the flash money.

**[9]** Learned counsel for the second appellant canvassed three main issues:

(a) the non-calling of the two Myanmar nationals;

(b) failure to give adequate consideration to the defence; and

(c) the discrepancy with regards to the flash money.

**[10]** For the third appellant, the main issues raised were:

(a) the non-calling of the two Myanmar nationals;

(b) the discrepancy in the flash money;

(c) the break in the chain of evidence; and

(d) the role of the informer

## OUR FINDINGS

**[11]** Common to all the appellants is the issue concerning the non-calling of the two Myanmar nationals and the discrepancy in the evidence of the prosecution's witnesses as regards the flash money. The two Myanmar nationals were arrested 15 minutes earlier than the appellants and the arrest took place at the same Caltex Petrol Station. The significance of both these issues is that the defence contended that this case does not involve agent provocateurs but this is an ordinary arrest case.

**[12]** Having perused the appeal records we are of the view that the issue of non-calling of the two Myanmar nationals and the discrepancy of the flash money is devoid of merits. On the evidence as a whole it is our judgment that this case involves agent provocateurs with the active involvement of an informer. In fact, learned counsel for the second appellant had at the outset of the hearing of the appeal raised the issue that the informer had assumed the mantle of an agent provocateur whereas the third appellant had listed this issue as one of the grounds of appeal in his petition of appeal.

*The break in the chain of evidence*

**[13]** The submission of learned counsel for the third appellant was that there was a discrepancy between the weight given by the police and the weight by the chemist. The gross weight by the raiding officer ('SP6') was 900g whereas the weight by the chemist ('SP1') was 914.69g. The complaint is that by the time the drugs reached the chemist, the weight had increased by 14g and there is therefore a doubt as to the identity of the drugs.

**[14]** Based on the evidence as a whole as contained in the appeal records, we are satisfied that the drugs seized by SP6 and handed over to SP7 were the same drugs that were sent to the chemist for analysis and which were later tendered in court as evidence (see *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345; *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636 [Mahkamah Persekutuan Rayuan Jenayah No 05–87 Tahun 2012(B)]). We noted though, from the appeal records that the identity of the drugs was never

challenged during the trial.

*The informer*

**[15]** The learned deputy public prosecutor submitted that the informer merely acted as an interpreter. Indeed, there was evidence that the informer had acted as an interpreter. However, there was also the evidence of SP4 that 'OKT2 dan OKT3 boleh berbahasa Malaysia untuk urusan dadah sahaja tetapi bukan berkaitan dengan perkara lain.' The dealing between the agent provocateurs and the second and the third appellants must surely be 'untuk urusan dadah'. Hence, by the evidence of SP4, the need for an interpreter does not arise as the second and the third appellants could converse in Bahasa Malaysia.

**[16]** In any event, upon close scrutiny of the entire evidence, we find that the so-called informer was not a passive informer and that he did not merely act as an interpreter but he had played an active role in the whole transaction. The evidence of SP4 and SP5 established that the informer was present after they had met the second and the third appellants; the informer was involved in the discussion or negotiation on the price and quantity of heroin and the informer was present from the beginning until the appellants were arrested. In the circumstances, the informer cannot be said to be an informer within the meaning of s 40 of the Act and cannot claimed any protection from disclosure of his identity (see *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1).

**[17]** In the context of the present case, the informer is essential to the unfolding of the prosecution's case. The informer who had assumed the role of an agent provocateur should have been called by the prosecution (see *Kamalahassan a/l Latchimanan v Pendakwa Raya* [2008] 3 MLJ 810; [2008] 4 CLJ 794). Not only was the informer not called but he was also not offered to the defence. We are of the view that there was therefore a gap in the narrative of the prosecution's case (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1). The failure to call or offer the informer in the circumstances of the case would have triggered the adverse inference under s 114(g) of the Evidence Act 1950, against the prosecution. In the grounds of judgment, nowhere did the learned judicial commissioner direct her mind to this point. This in our view is a serious misdirection by way of a non-direction which rendered the conviction of the second appellant and the third appellant wholly unsafe.

**[18]** For that reason, we unanimously allowed the appeals by the second and the third appellants. We set aside the conviction and sentence imposed by the High Court. We acquitted and discharged the second and the third appellants.

**[19]** With regards to the first appellant, the evidence is overwhelming that it was the first appellant who was carrying the bag containing the drugs. The first appellant in his statement from the dock denied the prosecution's case that he was carrying the plastic bag containing the drugs. For the sake of completeness, we wish to state that it is not the duty of the first appellant to prove his innocence and it is the statutory right of the first appellant to give a statement from the dock. The statement will have to be considered by the court in the light of the totality of the evidence. In this regard, we find that the learned judicial commissioner erred in stating that 'the defence should have put the three accused in the witness box to explain to this honourable court and prove their innocence by creating a reasonable doubt'.

**[20]** Be that as it may, the evidence of SP4 and SP6 that it was the first appellant who had carried the plastic bag remained unchallenged. The first appellant threw away the bag when he was confronted by the police. The first appellant's conduct leads to an irresistible inference that he knew the bag he was carrying contained the impugned drugs (see *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337; *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717). As the quantity of the drugs exceeded the limit prescribed under the Act, the first appellant was presumed to be trafficking in the said drugs.

**[21]** On the facts, the first appellant had failed to rebut the presumption of trafficking on the balance of probabilities. In the light of the overwhelming evidence against the first appellant, we do not think the presence of the informer would have made any difference insofar as the first appellant is concerned. On a proper direction, a reasonable tribunal would have come to a similar verdict and convict the first appellant (see *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381). We therefore find that the conviction against the first appellant is safe. The appeal of the first appellant was unanimously dismissed. We affirmed the conviction and sentence imposed by the High Court against the first appellant.

*Appeal by first appellant dismissed and appeal by second and third appellants allowed.*

Reported by Afiq Mohamad Noor